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THE

AMERICAN LAW REGISTER.

OCTOBER 1884.

POSSESSION BY HUSBAND AND WIFE.

I. THE QUESTIONS INVOLVED.—Three general rules of law relating to possession—namely: 1. Possession of chattels is *prima facie* proof of ownership: 1 Greenl. Ev., sect. 34. 2. Delivery involves a change of possession: Benj. Sales, sect. 675, and 3. Retention of possession by a grantor is a badge of fraud: Bump. Fraud. Conv., chap. v.—are peculiarly difficult to apply to husband and wife. For, while on the one hand husband and wife have nominally the same home, and each has the right to live with the other (See *Anon.*, Deane & S. 295, 298–300; *Price*, 2 Fost. & F. 263, 264; *Barnes* v. *Allen*, 30 Barb. 663, 668; *Westlake* v. *Westlake*, 34 Ohio St. 621, 628; *Walker* v. *Reamy*, 36 Penn. St. 410, 414; *Ximines* v. *Smith*, 39 Tex. 49, 52; Stewart Mar. & Div., sect. 175,) now as at common law: (*Cole* v. *Van Riper*, 44 Ill. 58, 63; *Snyder* v. *People*, 26 Mich. 106, 108, 110); *Walker* v. *Reamy*, 36 Penn. St. 410, 414; and both of them therefore not only actually use, enjoy and possess the property in and about their home (*Larkin* v. *McMullin*, 49 Penn. St. 29, 34, 35), but also incidentally have the right to do so: *Holcomb* v. *Peoples' Bank*, 92 Penn. St. 338, 343; *Walker* v. *Reamy*, 36 Id. 410, 414. See *Lee* v. *Mathews*, 10 Ala. 682, 687; *Bell* v. *Bell*, 37 Id. 536, 542; *Cole* v. *Van Riper*, 44 Ill. 58, 63; *Schindel* v. *Schindel*, 12 Md. 108, 121, 294, 313; *Com.* v. *Hartnett*, 3 Gray 450, 452; *Snyder* v. *People*, 26 Mich. 106, 109; on the other hand, now that married women's separate property is nearly everywhere recognised, the wife may, as well as the husband, be the actual owner of the property so

used, enjoyed and possessed, as her *equitable* or as her *statutory* separate estate. Whether any presumption arises as to the ownership of the property so possessed: *Hill* v. *Chambers*, 30 Mich. 422, 428; whether there can be delivery between husband and wife of such property: *Wheeler* v. *Wheeler*, 43 Conn. 503, 509; and whether the continued use and enjoyment of such property by the grantor after the transfer is evidence of fraud (*Moreland* v. *Myall*, 14 Bush 474, 477), are questions which it is the purpose of this article to discuss.

II. PRESUMPTIONS AS TO OWNERSHIP OF PROPERTY IN THE POSSESSION OF HUSBAND AND WIFE.—At common law husband and wife were one: *White* v. *Wager*, 25 N. Y. 328, 329; the wife's existence was merged in that of her husband: *Burleigh* v. *Coffin*, 22 N. H. 118, 124; it is even said that she was civilly dead: *O'Ferrall* v. *Simplot*, 4 Iowa 381, 389; all her present property rights passed to her husband; her personalty absolutely: *Cox* v. *Scott*, 9 Baxt. 305, 310; her realty during coverture at least: *Mutual* v. *Deale*, 18 Md. 26, 47; she had herself no property in possession: *Com.* v. *Williams*, 7 Gray 337, 338; and so her possession was his possession (*Bell* v. *Bell*, 37 Ala. 536, 542), and even money in her pocket was deemed in his actual possession. See *Carleton* v. *Lovejoy*, 54 Me. 445, 446; *Cox* v. *Scott*, 9 Baxt. 305, 309. As a result, the possession of husband and wife at common law was the possession of the husband (*Topley* v. *Topley*, 31 Penn. St. 328, 329), and as far as it was evidence of title at all, it was evidence of his title: *Robinson* v. *Brems*, 90 Ill. 351, 354. Courts of equity, however, recognised the separate existence of the wife (*Milner* v. *Freeman*, 40 Ark. 62, 68), and at an early date enforced settlements to the sole and separate use of married women: 2 Story Eq. Jur., sects. 1368, 1378; thus arose wives' equitable separate estates (*Hulme* v. *Tenant*. 1 White & T. Lead. Cas. [481], notes), and statutes have now nearly everywhere created statutory separate estates: See the statutes of the various states. But although wives may now own and possess property themselves, and the main ground for the common-law rule, that possession of the wife is the possession of her husband, is thus removed, the form or shadow of this rule still remains, and the presumption still exists that all property in or about the family matrimonial home (*Allen* v. *Eldridge*, 1 Col. 287, 290; *Walker* v. *Reamy*, 36 Penn. St. 410, 416,) is in the possession of the husband

and is his: *Bell* v. *Bell*, 37 Ala. 536, 541; *Allen* v. *Eldridge*, 1 Col. 287, 290; *Huff* v. *Wright*, 39 Ga. 41, 43; *Robinson* v. *Brems*, 90 Ill. 351, 354; *Kahn* v. *Wood*, 82 Id. 219; *Reeves* v. *Webster*, 71 Id. 307; *Farrell* v. *Patterson*, 43 Id. 52, 59; *Davison* v. *Smith*, 20 Iowa 466; *Com.* v. *Williams*, 7 Gray 337, 338; *Hill* v. *Chambers*, 30 Mich. 422, 428; *Walker* v. *Reamy*, 36 Penn. St. 410, 416; *Winter* v. *Walter*, 37 Id. 155, 162; *Rhoads* v. *Gordon*, 38 Id. 277, 279; *Popley*, 31 Id. 328, 329; *Nelson* v. *Hollins*, 9 Baxt. 553, 555; *Stanton* v. *Kirsch*, 6 Wis. 338, 341; *Duress* v. *Horneffer*, 15 Id. 195, 197; *Weymouth* v. *Chicago*, 17 Id. 550, 551. But see *Whiton* v. *Snyder*, 88 N. Y. 299; and that any business carried on by both husband and wife jointly is the husband's: *Brownell* v. *Nixon*, 37 Ill. 197, 205; *Mason* v. *Bowles*, 117 Mass. 86, 89. But this presumption is rebuttable: *Hill* v. *Chambers*, 30 Mich. 422, 428; *Mason* v. *Bowles*, 117 Mass. 86, 89; the equivocal possession of husband and wife is the possession of that one of them in whom the title is. See *McNeill* v. *Arnold*, 17 Ark. 154, 175; *Stewart* v. *Ball*, 33 Mo. 154, 156; *Scott* v. *Simes*, 10 Bosw. 314, 320; and just as the possession of the wife is the possession of the husband when the title is his: *Bell* v. *Bell*, 37 Ala. 536, 541; *Pope* v. *Tucker*, 23 Ga. 484, 487; *Davidson* v. *Smith*, 20 Iowa 466; *Jordan* v. *Jordan*, 52 Me. 320, 321; *Carleton* v. *Lovejoy*, 54 Id. 445, 446; *Com.* v. *Williame*, 7 Gray 337, 338; *Walker* v. *Reamy*, 36 Penn. St. 410, 415; *Duress* v. *Horneffer*, 15 Wis. 195, 197; so his possession is her possession when the title is hers: *Lee* v. *Matthews*, 10 Ala. 682, 687; *Robison* v. *Robison*, 44 Id. 227, 237; *Pinkston* v. *McLemore*, 31 Id. 308, 313, 314; *McNeill* v. *Arnold*, 17 Ark. 154, 175; *Pierce* v. *Hasbrouck*, 49 Ill. 24, 27; *Hileman*, 85 Ind. 1; *Hanson* v. *Millett*, 55 Me. 184, 189; *Hill* v. *Chambers*, 30 Mich. 422, 428; *McNally* v. *Weld*, 30 Minn. 209; *Scott* v. *Simes*, 10 Bosw. 314, 320; *Lydia* v. *Cowan*, 23 N. Y. 505; *Gicker* v. *Martin*, 50 Penn. St. 138, 140; *Nelson* v. *Hollins*, 9 Baxt. 553, 555. So neither of them can rely on the mere fact of possession to prove acquisition of title from the other: *Root* v. *Schaffner*, 39 Iowa 375, 377; *White* v. *Zane*, 10 Mich. 333, 335; *Lyle's Estate*, 11 Phila. 64, 65; *Bachman* v. *Killinger*, 55 Penn. St. 414, 417, 418; *Parvin* v. *Capewell*, 45 Id. 89, 93; the wife not being precluded from asserting title even to property which her husband has had taxed in his own name with her knowledge: *Deck* v. *Smith*, 12 Neb. 389,

395; for the intimacy of the marriage relation renders exclusive possession well nigh impossible (*Holcomb* v. *Peoples' Bank*, 92 Penn. St. 338, 343), and it is not the policy of the law to interfere with the mutual trust and confidence between husband and wife. See *Cole* v. *Van Riper*, 44 Ill. 58, 63; *Snyder* v. *People*, 26 Mich. 106, 109; *Walker* v. *Reamy*, 36 Penn. St. 410, 414. Still, the presumption of the husband's ownership does exist. (See also, *Alverson* v. *Jones*, 10 Cal. 9; *Smith* v. *Hewett*, 13 Iowa 94; *Eldridge* v. *Preble*, 34 Me. 148; *Smith* v. *Henry*, 35 Miss. 369; *Gault* v. *Saffin*, 44 Penn. St. 307; *Bear* v. *Bear*, 33 Id. 525; *Gamber* v. *Gamber*, 18 Id. 363; *Goodyear* v. *Rumbaugh*, 13 Id. 480; but see *Johnson* v. *Runyon*, 21 Ind. 115;) it continues after his death, so that property held by his widow, who is also his administratrix, was presumed to be held by her in her latter capacity: *Bradshaw* v. *Mayfield*, 18 Texas 21, 27. And it goes so far that even when a wife has bought property herself and in her own name, the purchase-money paid is presumed to have been her husband's: *Seitz* v. *Mitchell*, 94 U. S. 580, 582; *Price* v. *Sanchez*, 8 Fla. 136, 142; *Huff* v. *Wright*, 39 Ga. 41, 43; *Farrell* v. *Patterson*, 43 Ill. 52, 59; *Glann* v. *Younglove*, 27 Barb. 480, 481; *Winter* v. *Walter*, 37 Penn. St. 155, 161; *Aurand* v. *Schaffer*, 43 Id. 363, 364; *Rhoads* v. *Gordon*, 38 Id. 277, 279; *Rose* v. *Brown*, 11 W. Va. 122, 136; *Contra*, *Saunders* v. *Garrett*, 33 Ala. 454, 456; *Kluender* v. *Lynch*, 4 Keyes 361, 363; *Stoll* v. *Fulton*, 38 N. J. L. 430, 437, 438. This indeed makes little difference as far as her husband is concerned (see *Jackson* v. *Jackson*, 91 U. S. 122, 125; *Andrews* v. *Oxley*, 38 Iowa 578, 580; *Bent* v. *Bent*, 44 Vt. 555, 559), or a stranger (*Weymouth* v. *Chicago*, 17 Wis. 550, 551. See *Faddis* v. *Woollomes*, 10 Kans. 56; *Miller* v. *Bannister*, 109 Mass. 289; *Peters* v. *Fowler*, 41 Barb. 467, 468), for against them a gift to her is good, and may be inferred from the circumstances: *Jennings* v. *Davis*, 31 Conn. 134, 142; *Manny* v. *Rixford*, 44 Ill. 129, 133; *Skillman* v. *Skillman*, 13 N. J. Eq. 403, 407; *Bradshaw* v. *Mayfield*, 18 Tex. 21, 25; but as against her husband's creditors (as when she sues them for taking her goods for his debts: *Duress* v. *Horneffer*, 15 Wis. 195, 197), she must prove not only that the purchase was made for herself (see *Marshal* v. *Curtwell*, L. R., 20 Eq. 328, 331; *Grain* v. *Shipman*, 45 Conn. 572, 583; *Wormley* v. *Wormley*, 98 Ill. 544; *Dunn* v. *Hornbeck*, 7 Hun 629, 630; *Bent* v. *Bent*, 44 Vt. 555,

559), but also that it was made out of her separate funds (*Erdman* v. *Rosenthal*, 60 Md. 312, 316; *Glann* v. *Younglove*, 27 Barb. 480, 483; *Curry* v. *Bott*, 53 Penn. St. 400, 403. See also, *Blumer* v. *Pollak*, 18 Fla. 707; *Farrell* v. *Patterson*, 43 Ill. 52, 59; *Keeney* v. *Good*, 21 Penn. St. 349; *Rhoads* v. *Gordon*, 38 Id. 277, 279; *Stanton* v. *Kirsch*, 6 Wis. 338, 341; *Duress* v. *Horneffer*, 15 Id. 195, 197,) or upon her separate credit: *Erdman* v. *Rosenthal*, 60 Md. 312, 316; *Glann* v. *Younglove*, 27 Barb. 480, 483. And this presumption has been recognised in a suit where the wife was defendant, and where the burden of proof was held to be on her creditor, who seized goods alleged to be hers, to show that they were hers and not her husband's: *Crane* v. *Seymour*, 3 Md. Ch. 483, 486. It has, however, been held that a wife's possession under a mortgage is *prima facie* evidence of her title: *Morrison* v. *Koch*, 32 Wis. 254, 259. As to real estate it has been held that when the husband and wife live on the wife's farm the husband is presumed the tenant, and owns the crop unless the wife proves that he farmed it as her agent: (*Langford* v. *Greirson*, 5 Brad. 362, 366. But see *Stout* v. *Perry*, 70 Ind. 501, 504; *Bowen* v. *Arnsden*, 47 Vt. 569, 573;) but this view is in conflict with the rules that the increase of separate property is separate property: *Bongard* v. *Core*, 82 Ill. 19, 21; and that the wife's separate property in possession of the husband and wife is in her possession (*Nelson* v. *Hollins*, 9 Baxt. 553, 555), and will therefore probably not prevail: *Stout* v. *Perry*, 70 Ind. 501, 504; *Russell* v. *Long*, 52 Iowa 250, 252; *DeBlane* v. *Lynch*, 23 Tex. 25, 27. In fact it is well settled that a husband may manage his wife's property without acquiring any rights therein, or in any way rendering it liable for his debts: Cases collected in *Miller* v. *Peck*, 18 W. Va. 75, 79–97; *Cooper* v. *Ham*, 49 Ind. 393, 400–416. It seems also that there can be no such thing as "adverse possession" between husband and wife while they cohabit: *Bell* v. *Bell*, 37 Ala. 536, 542. Nor is possession of a husband so far the possession of his wife that he can set up her title as against his bailor to property held by him as bailee: *Pulliam* v. *Burlingame*, 18 Cent. L. J. 314, 315.

III. DELIVERY BETWEEN HUSBAND AND WIFE.—In the case of a sale of chattels the property may pass without change of possession, delivery being part of the obligation of the vendor: Benj. Sales, sect. 674, *et seq.*; but a gift is of no effect without delivery

(*Dilts* v. *Stevenson*, 17 N. J. Eq. 407, 413, 414; *Woodruff* v. *Clark*, 42 N. J. L. 198, 202; *Bradshaw* v. *Mayfield*, 18 Tex. 21, 25), because until delivery it is an unexecuted contract, and being without consideration is not enforceable even in equity: *Breton* v. *Woollven*, L. R., 17 Ch. Div. 416, 421; *Cotteen* v. *Missing*, 1 Madd. 176, 183; *Fowler* v. *Trebein*, 16 Ohio St. 493, 497. By delivery is meant a change of possession intended to accompany a change of property: See 1 Pars. Cont. 234; 2 Schoul. Per. Prop. 71; *Armitage* v. *Mace*, 48 N. Y. Super. 107; *Caldwell* v. *Wilson*, 2 Spears 75. Gifts between husband and wife are by no means uncommon, and are valid in equity if not at law: *Eddins* v. *Buck* 23 Ark. 507, 509; *Peck* v. *Brummagin*, 31 Cal. 440, 446; *Underhill* v. *Morgan*, 33 Conn. 105, 107; *Manny* v. *Rexford*, 44 Ill. 129, 133; *Clawson* v. *Clawson*, 25 Ind. 229, 239; *Chew*, 38 Iowa 405, 406; *Thomas* v. *Harkness*, 13 Bush 23, 27; *Latimer* v. *Glenn*, 2 Id. 535, 543; *Paschall* v. *Hall*, 5 Jones Eq. 108, 110; *Seymour* v. *Fellows*, 77 N. Y. 178, 179; *Coates* v. *Gerlach*, 44 Penn. St. 43, 45; *Bradshaw* v. *Mayfield*, 18 Tex. 21, 26; *Fox* v. *Jones*, 1 W. Va. 205, 217. But the donor's intention to divest himself or herself of the property, and the carrying out of that intention by delivery, must both be clearly proved by the donee, wife or husband as the case may be (*Breton* v. *Woollven*, L. R., 17 Ch. Div. 416, 421; *Cotteen* v. *Missing*, 1 Madd. 176, 183; *Pierce*, 7 Biss. 426, 427; *Machen* v. *Machen*, 38 Ala. 364, 368; *Wheeler* v. *Wheeler*, 43 Conn. 503, 509; *Woodson* v. *Pool*, 19 Mo. 340, 345; *Skillman* v. *Skillman*, 13 N. J. Eq. 403, 407; *Dilts* v. *Stevenson*, 17 Id. 407, 413, 414; *Woodruff* v. *Clark*, 42 N. J. L. 198, 202; *Neufville* v. *Thomson*, 3 Edw. Ch. 92, 94; *Paschall* v. *Hall*, 5 Jones Eq. 108, 109, 112; *Campbell's Appeal*, 80 Penn. St. 298, 306; *Wade* v. *Cantrell*, 1 Head. 346, 347; *Pierce* v. *Whaling*, 7 Biss. 426, 427; *Patton* v. *Patton*, 75 Ill. 446, 451). And since husband and wife are about equally in possession of property in and about their common home (*Larkin* v. *McMullin*, 49 Penn. St. 34, 35; *Holcomb* v. *Peoples' Bank*, 92 Id. 338, 343), and neither can rely on such equivocal possession to prove title as against the other (*White* v. *Zane*, 10 Mich. 333, 335; *Allen* v. *Miles*, 36 Miss. 640, 644; *Bachman* v. *Killinger*, 55 Penn. St. 414, 417, 418), actual delivery between husband and wife is most difficult to prove (*Pierce*, 7 Biss. 426, 428), and the only safe way of perfecting a gift between them is by constructive

delivery through a formal instrument, such as a bill of sale: *Ex parte Cox*, L. R., 1 Ch. Div. 302, 306; *Hutchins* v. *Dixon*, 11 Md. 29, 40; *Enders* v. *Williams*, 1 Met. (Ky.) 346, 350. To illustrate: If a husband says to his wife, "This wagon is yours," referring to a wagon he is using, and goes on using it as before, the wife cannot claim it even as against him: *Dilts* v. *Stevenson*, 17 N. J. Eq. 407, 413; but if he says to his wife in buying a horse, "I am buying this horse for you—it is yours," and it is then delivered by the vendor to him and put in his stable, he receives it and keeps it merely as her agent—it is hers: *Wheeler* v. *Wheeler*, 43 Conn. 503, 509. The above reasoning does not, however, apply to mere personal effects or ornaments used by the husband or wife (see *Pierce* v. *Whaling*, 7 Biss. 426, 427; *Gentry* v. *McReynolds*, 12 Mo. 535; *Rogers* v. *Fales*, 5 Penn. St. 154, 158), or to such other property as the one or the other uses and enjoys alone: See *Pinkston* v. *McLemore*, 31 Ala. 308, 313, 314.

V. POSSESSION WHEN FRAUDULENT.—As already shown a wife must clearly prove her title to any property in or about the family home, or apparently in her husband's possession: *Walker* v. *Reamy*, 36 Penn. St. 410, 416; and as against her husband's creditors or *bona fide* purchasers for value she must show that she did not acquire such property directly or indirectly from him: *Erdman* v. *Rosenthal*, 60 Md. 312, 316; or, if she did acquire it from him, that he received a valuable (*Duffy* v. *Insurance*, 8 W. & S. 413, 434; *Salmon* v. *Bennett*, 1 Conn. 525; 1 Am. Lead. Cas. 31), and indeed, adequate consideration therefor: (*Goff* v. *Rogers*, 71 Ind. 459, 461; *Herschfeldt* v. *George*, 6 Mich. 456, 468; *Davis* v. *Davis*, 25 Gratt. 587, 596); or that it was a reasonable gift considering his means: *Kehr* v. *Smith*, 20 Wall. 31, 35; *Hapgood* v. *Fisher*, 34 Me. 407, 409; *Warner* v. *Dove*, 33 Md. 579, 586, 587; *Woolston's Appeal*, 51 Penn. St. 452, 456; *Warlick* v. *White*, 86 N. C. 139; 41 Am. Rep. 453; *i. e.*, she must show the absence of constructive fraud or *fraud in law*: *Hapgood* v. *Fisher*, 34 Me. 407, 409; *Belford* v. *Crane*, 16 N. J. Eq. 265, 270; *Wheaton* v. *Sexton*, 4 Wheat. 503; 1 Am. Lead. Cas. 1. But in the case of conveyances by a debtor the general rule is, that if after the conveyance is made he retains possession of the property conveyed, such conduct is evidence of an actual intent to defraud his creditors (*fraud in fact*), and must be explained: *Stadtler* v. *Wood*, 24 Tex. 622; *Bullis* v. *Borden*, 21 Wis. 136;

Bump. Fraud. Con., chap. v., p. 110; and the question is, Does this general rule apply to husband and wife? It is said that a husband's possession of his wife's property is not in itself evidence of fraud (*Barncord* v. *Kuhn*, 36 Penn. St. 383, 391. See *Ex parte Cox*, L. R., 1 Ch. Div. 302, 306; *Ware* v. *Gardner*, L. R., 7 Eq. 317, 321; *Wheaton* v. *Sexton*, 4 Wheat. 503; *Jones* v. *Clifton*, 101 U. S. 225, 229, 230; *Clayton* v. *Brown*, 17 Ga. 217, 219; *Lyman* v. *Cessford*, 15 Iowa 229, 234; *Enders* v. *Williams*, 1 Met. (Ky.) 346, 350; *Erdman* v. *Rosenthal*, 60 Md. 312, 316), because he has the right growing out of the right of cohabitation to use and possess her property in their home: *Lee* v. *Matthews*, 10 Ala. 682, 687; *Larkin* v. *McMullin*, 49 Penn. St. 29, 34, 35; but this is not true if his possession is not consistent with the purpose for which the property was given to or purchased by her; *Clayton* v. *Brown*, 17 Ga. 217, 219; *Enders* v. *Williams*, 1 Met. (Ky.) 346. 350. And although she may by allowing him to deal with her property as owner, make him her agent with respect thereto and be bound by his acts (*Spaulding* v. *Drew*, 55 Vt. 255, 257. See *Walker* v. *Carrington*, 74 Ill. 446, 465; *Early* v. *Rolfe*, 95 Penn. St. 58, 60), it is not a fraud, and she is not estopped by her silence *in his presence* when he asserts his title to her chattels (*Carpenter* v. *Carpenter*, 27 N. J. Eq. 502, 504; *Early* v. *Rolfe*, 95 Penn. St. 58, 61; *Ladd* v. *Hildebrant*, 27 Wis. 135, 143,)—at least where the doctrine of coercion of wife by husband is not exploded: See especially works on criminal law. But some authorities hold that if a husband, with his wife's consent, retains possession of property which he had settled on her, and is thus enabled to get credit, she cannot assert her title: *Pierce* v. *Whaling*, 7 Biss. 426, 429; *Moreland* v. *Myall*, 14 Bush 474, 477; *Bowen* v. *Amsden*, 47 Vt. 569, 573; certainly she cannot, if she allows him to retain possession for the purpose of deceiving his creditors: *Lyman* v. *Cessford*, 15 Iowa 229, 234. And so, if he should give her chattels for which she would have no use, but which he would have to continue to use in his business—as, if a laborer should give his wife his cart, horse and tools (see *Dilts* v. *Stevenson*, 17 N. J. Eq. 407, 414,)—certainly some special circumstances would have to be proved to rebut the presumption that he meant to secure himself against his creditors: See *Clayton* v. *Brown*, 17 Ga. 217, 219. In some states statutes expressly provide that a schedule of the separate property of married women shall be filed (see *Humph-*

ries v. *Harrison*, 30 Ark. 79; *Selover* v. *Commercial*, 7 Cal. 266; *Price* v. *Sanchez*, 8 Fla. 136; *Smith* v. *Hewett*, 13 Iowa 94, 96; *Odell* v. *Lee*, 14 Id. 411, 413), and that transfers between husband and wife shall be recorded: *Jones*, 19 Iowa 239, 240; *Teague* v. *Downs*, 69 N. C. 280, 287; *Lewis* v. *Caperton*, 8 Gratt. 148, 165; and it seems that general statutes which provide that "no property whereof the grantor *shall remain in possession*, shall pass as against his creditors unless by bill of sale duly recorded" (Md. R. C. 1878, sect. 45, p. 390), apply to all transfers between husband and wife where the grantor *apparently* remains in possession. So that not only to meet the difficulty of proving delivery (*Enders* v. *Williams*, 1 Met. (Ky.) 346, 350;) but also to rebut the presumption of fraud (*Ex parte Cox*, L. R., 1 Ch. Div. 302, 306; *Ware* v. *Gardner*, L. R., 7 Eq. 317, 321), transfers between husband and wife should be by formal instrument duly recorded.

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Baltimore, Md.

RECENT ENGLISH DECISIONS.

Court of Appeal.

WHALLEY *v.* LANCASHIRE AND YORKSHIRE RAILWAY CO.

In consequence of an extraordinary rainfall water accumulated against an embankment of the defendants. Thereupon they cut trenches through the embankment and caused the water to flow on to the plaintiff's land. The act of the defendants was reasonably necessary for the protection of their property, but caused more damage to the plaintiff than if the water had been allowed to percolate the embankment. *Held*, on appeal, that the defendants were liable for the damage which, but for their act in cutting the trenches, would not have happened to the plaintiff.

APPEAL of the defendants from the judgment of DAY, J., at trial.

The defendants were the owners of a railway embankment standing on sloping ground. On August 30th 1883, owing to an extraordinary rainfall a quantity of water accumulated on the upper side of the slope against the embankment. In order to protect the embankment the defendants cut trenches through it, thereby causing the water to flow on to the plaintiff's land, which was on the lower side of the slope, and to do damage, in respect of which he brought an action against the defendants.